BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Rulemaking to Amend Parts 1, 2, 21 and 25	**)**	**CC Docket No. 92-297**
of the Commission's Rules to Redesignate	**)**	
the 27.5-29.5 GHz Frequency Band, to	**)**	
Reallocate the 29.5-30.0 GHz Frequency Band,	**)**	
to Establish Rules and Policies for Local	**)**	
Multipoint Distribution Service and for	**)**	
Fixed Satellite Services	**)**	

To: The Commission

COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP

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Dated: January 21, 2000

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SUMMARY

The Rural Telecommunications Group (RTG) strongly supports the June 30, 2000 sunset of the Local Multipoint Distribution Service ("LMDS") in-region eligibility restriction and vigorously opposes any extension of the restriction as applied to rural telephone companies. Rural telephone companies lack the incentive or ability to acquire and "warehouse" LMDS spectrum in order to "forestall" competition. LMDS is just one tool among many for providing both basic and broadband services. Through industry, Congressional and Commission action, the market place is full of comparable spectrum and alternative competitive technologies. There is simply too much spectrum available in comparable wireless services and too many alternative technologies, both wired and wireless, for a rural telephone company to attempt to forestall competition in either basic exchange service or broadband service by acquiring and warehousing LMDS spectrum. Accordingly, rural telephone companies have no incentive to acquire and warehouse LMDS spectrum for anti-competitive purposes.

While the in-region restriction provides little, if any benefit to the public, the application of the in-region restriction to rural telephone companies does impose significant economic and social costs including delaying the deployment of LMDS in rural areas in direct contravention of the objectives of Section 309(j) of the Act and Section 706 of the Telecommunications Act of 1996 (the "1996 Act"). The in-region restriction has also discouraged investment in LMDS and created uncertainty in the market place.

Because there is little risk of competitive harm from the elimination of the restriction and significant cost for its extension, the Commission should take whatever action is necessary to allow the in-region restriction to sunset.

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COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP

The Rural Telecommunications Group (RTG), by its attorneys, hereby respectfully submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Sixth Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding. RTG strongly supports the June 30, 2000 sunset of the Local Multipoint Distribution Service ("LMDS") in-region eligibility restriction[1] and vigorously opposes any extension of the restriction as applied to rural telephone companies. Rural telephone companies lack the incentive or ability to acquire and "warehouse" LMDS spectrum in order to "forestall competition." Moreover, the in-region restriction has hampered the deployment of services in rural areas in direct contravention of the mandate of Section 309(j) of the Communications Act of 1934, as amended, ("the Act"). Accordingly, rather than extending in-region restriction, the Commission should take whatever action is necessary, including modifying the applicable standard of review, to ensure its sunset.

[1] The in-region restriction is codified at 47 C.F.R. § 101.1003(a).

I. Statement of Interest

RTG is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service and Personal Communications Service ("PCS") to their subscribers. Some of RTG's members also hold Local Multipoint Distribution Service ("LMDS"), Multichannel Multipoint Distribution Service ("MMDS"), and Wireless Communications Service ("WCS") licenses and are in the process of developing these licenses to introduce advanced telecommunications services and competition in the local exchange and video distribution markets in rural areas.

Each of RTG's members is affiliated with one or more rural telephone companies. The in-region restriction currently prohibits many of RTG's members from acquiring LMDS licenses or effectively prohibits them from doing so by dramatically increasing the cost of acquiring licenses. The in-region restriction also forced at least one of RTG's members to expend considerable resources divesting a portion of its license area, with no corresponding benefit to the public, in order to remain in compliance with the in-region restriction. RTG has participated extensively in this proceeding opposing the applicability of the in-region restriction to rural telephone companies.[2]

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[2] *See, e.g.,* RTG's Partial Opposition to Petition for Reconsideration of WebCel Communications, Inc. filed July 2, 1997; RTG Petition for Reconsideration filed May 29, 1997; Comments of the Ad Hoc Rural Telecommunications Group (RTG's predecessor-in-interest), filed August 12, 1996.

II. Discussion

The FCC premised the in-region restriction in large measure on the prediction that the licensing of LMDS was a rare opportunity to create, *inter alia*, facilities-based competition in the local exchange market and that incumbent local exchange carriers ("ILECs"), including rural telephone companies, would attempt to forestall such competition by acquiring and warehousing the LMDS spectrum in geographic license areas that overlapped their wireline service areas.[3] As explained below, however, both the Commission's hopes for LMDS and fears of anti-competitive abuses were vastly exaggerated. LMDS is not a unique "third pipe" to the home or business, exclusively capable of introducing competition into the local exchange and multichannel video distribution markets. LMDS is one tool among many, and there is simply too much spectrum available in comparable wireless services and too many alternative technologies, both wired and wireless, for a rural telephone company to attempt to forestall competition in either basic exchange service or broadband service by acquiring and warehousing LMDS spectrum. Accordingly, rural telephone companies have no incentive to acquire and warehouse LMDS spectrum for anti-competitive purposes.

While the in-region restriction provides little, if any benefit to the public, the application of the in-region restriction to rural telephone companies does impose significant economic and social costs including delaying the deployment of LMDS in rural areas in direct contravention of the objectives of Section 309(j) of the Act and Section 706 of the Telecommunications Act of 1996 (the "1996 Act"). The in-region restriction has also discouraged investment in LMDS and created uncertainty in the

[3] *See NPRM* ¶ 5.

market place.

Because there is little risk of competitive harm from the elimination of the restriction and significant cost for its extension, the Commission should take whatever action is necessary to allow the in-region restriction to sunset.

A. LMDS Is Only One Service Among Many, and It Would Be Irrational and Impossible For a Rural Telephone Company to Attempt to "Forestall" Competition by Acquiring and Warehousing LMDS Spectrum Because There Are Numerous Other Competitive Alternatives and Vast Amounts of Comparable Spectrum Available

In applying the LMDS in-region restriction to rural telephone companies, the FCC reasoned that LMDS presented a unique opportunity to create a facilities-based competitor in the local exchange and broadband data services markets and that ILECs, including rural telephone companies, would have an incentive to forestall such a competitor by acquiring the LMDS A block license.[4] Although RTG believes licensees will ultimately use LMDS spectrum as a powerful telecommunications tool, as discussed below, the FCC's assumptions underlying the restriction have not been validated. LMDS is not uniquely situated to support competition in either the local exchange or broadband markets, and rural telephone companies lack the incentive to acquire LMDS spectrum in order to forestall competition.

First, numerous technical, regulatory, legal and financial obstacles limit LMDS's ability to support stand-alone competitive networks. RTG believes that the in-region restriction compounds these problems by limiting the amount of intellectual and financial capital devoted to their solution. Moreover, because of the well documented technical limitations of the spectrum, LMDS will never be

[4] *See id.* ¶¶ 4, 6.

the best solution for all telecommunication applications. For example, because of line-of-sight limitations and high cost of customer premises equipment ("CPE"), it is questionable whether LMDS will ever develop as a tool for deploying either basic or broadband service to individual residential customers. Instead as the Commission acknowledges, LMDS is more likely to be used as one element of a telecommunications network rather than as a stand-alone network or telecommunications service.[5]

Second, rather than being a unique "third pipe" to the home or office, LMDS is only one of many potential tools capable of supporting competitive local exchange and broadband services. Despite the word "Service" in its name, LMDS is neither a specific "service" nor a specific technology. Rather, LMDS is four bands of high frequency spectrum[6] which, in theory, can be used to provide, or to assist in the provision of, consumer services such as voice, video, data and broadband telecommunications services generally as well as carrier services such as backbone facilities and "wireless fiber."

LMDS, however, is not unique in its potential ability to deliver these services or to serve as a "roof-top" wireless network element in a telecommunications network. As the Commission acknowledges in the *NPRM*, numerous wired technologies can also provide basic and broadband services[7] and companies are spending tremendous sums of money to deploy the competing basic and broadband technologies. More importantly for purposes of this discussion, there are myriad alternative

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[5] *See id.* ¶ 33.

[6] The A block license, to which the in-region restriction applies, consists of three bands of spectrum in the 28, 29 and 31 GHz bands.

[7] *See NPRM* ¶ 38.

and comparable bands of spectrum with which providers can deploy both basic and broadband services.

The *NPRM* specifically seeks comment on the 24.25-24.45 GHz and 25.05-25.25 GHz bands (“24 GHz”), the 38.6 GHz to 40.0 GHz band ("39 GHz"), as well as 2 GHz Multipoint Distribution Service ("MDS"), 2.5 GHz Multichannel Multipoint Distribution Service ("MMDS"), and Instructional Television Fixed Service ("ITFS") and the extent to which these services are substitutable with LMDS.[8] Although the different fixed broadband services listed in the *NPRM* have certain differing characteristics, they will use virtually the same equipment to support service offerings which are or will be, largely substitutable with LMDS and with each other.[9]

The fixed wireless providers identified in the *NPRM* are likely to offer data services and high speed Internet access bundled with basic service. They will generally target small businesses and small office/home office customers, although some of the frequencies, notably MMDS spectrum, may also support broadband offerings to the home. Equipment manufacturers are developing equipment that is “frequency agnostic" and will work in any of the bands with relatively little modification. Manufacturers and providers anticipate that the technology will be transparent to the end user. Carriers are also combining various bands of spectrum and wired services to develop the best mix of technologies to incorporate in their networks.

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[8] *See id.* ¶ 46.

[9] The high band services -- 24 GHz, LMDS, and 39 GHz -- are particularly similar both in terms of the technical limitations of the bands and the types of services that providers are or anticipate offering. The propagation characteristics, particularly the line-of-sight limitation, of the high band frequencies will largely determine the type of services which carriers will offer using these frequencies and the type of customers to whom service will be offered and delivered.

To illustrate the substitutability of the various fixed wireless services, RTG notes that MCI WorldCom, Inc. and Sprint Corp. have announced that they will roll out broadband services to rural areas across the country, primarily using the MMDS licenses the two companies acquired in the past year.[10] WinStar, in addition to its 39 GHz licenses, also acquired various LMDS licenses, and RTG's own members are developing systems to combine LMDS and MMDS or LMDS and WCS spectrum with their wireline facilities to extend their total service areas and to expand their broadband capabilities both inside and outside their existing wireline service areas.

While tacitly acknowledging that fixed wireless spectrum may be substitutable, the *NPRM* seeks comment on whether the size of the A block license or lack of LMDS incumbents renders LMDS unique, thereby distinguishing it from other wireless services.[11] Although the 1,150 megahertz LMDS A block license is large when compared with other *individual* licenses, a licensee need not posses anywhere near this much spectrum in order to offer competitive local exchange or broadband service. A licensee can offer such competitive services with considerably less spectrum, and licensees are currently doing so. In addition, a company can aggregate fixed wireless spectrum in excess of the amount allocated to the LMDS A block license. For example, a company could acquire all of the 39 GHz licenses in a given area to aggregate 1,400 megahertz of spectrum. Accordingly, the size of the LMDS A block does not cause it to be uniquely situated to support competition.

Nor does an absence of incumbents cause LMDS to be unique. First, the Commission has

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[10] *See Telecommunications Reports***,** Vol. 66, No. 3, Page 7 (January 17, 2000), "Ebberts Vows Rural Broadband Rollout After Merger, Sees Benefits from AOL-Time Warner Agreement."

[11] *See NPRM* ¶ 44-45.

auctioned and licensed all LMDS spectrum, and accordingly, there are now LMDS incumbents. An ILEC would have to purchase licenses from one or more LMDS licensees, and expectations regarding license values are quite high. Second, to the extent that other frequency bands such as the 24 GHz and 39 GHz bands are encumbered, there are potential broadband wireless competitors in these services. The fact that there is an existing competitor, such as Teligent, L.L.C., in another service does not render that particular service less suitable than LMDS to sustain facilities-based competition. In fact, because 24 GHz and 39 GHz licensees did not have to pay for spectrum and because of their head start in the market, licensees in these services are in a competitively superior position to LMDS. In addition, the in-region restriction, and its surrounding regulatory uncertainty, does not apply to these services, and licensees in these services are therefore better able to attract capital and management expertise.

Indeed, many of the substitutable fixed wireless services have competitive advantages over LMDS such as more favorable propagation characteristics, lower spectrum acquisition costs, more mature equipment, or a head start in the market. For example, as noted above, MDS and MMDS spectrum has far more favorable propagation characteristics and may be better suited than high band spectrum for providing residential or rural service. Accordingly, LMDS is not a unique competitive service and providers can use the other fixed wireless spectrum identified in the *NPRM* to compete for basic and broadband services.

Moreover, technical innovation and flexible use now allow the provision of local exchange service and broadband services over a host of other bands in addition to the spectrum identified in the *NPRM*. For example, technical innovation now allows PCS and other traditional mobile service

providers to offer broadband Internet access at previously unimaginable speeds.[12] Similarly, because of technical innovation WCS licenses are also beginning to utilize their spectrum to deploy broadband services. BellSouth recently announced its deployment of WCS to provide wireless high speed Internet access.

In addition to currently licensed spectrum, the Commission has recently announced the auction date of 36 megahertz of spectrum in the 746-764 MHz and 776-794 MHz bands ("UHF Auction").[13] It is contemplated that some or all of this spectrum may be used for broadband wireless applications. In addition to allocations in the 24 GHz and 39 GHz bands, the Commission has also adopted a plan for fixed terrestrial use of a substantial amount of V-Band spectrum.[14] Finally, the Commission recently released a *Spectrum Policy Paper*[15] providing a blue-print for the licensing of approximately 202 megahertz of spectrum in the near future.

As demonstrated above, LMDS spectrum is not unique. As a result of industry, Congressional,

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[12] Recent technical developments will allow PCS spectrum to be used for broadband Internet access at speeds comparable to wireline xDSL (digital subscriber line) systems. *See* "New Wireless Web Systems Offer 3G Speeds with 2G Spectrum," *Telecommunications Reports*, Vol. 65, No. 46, p. 8 (December 6, 1999). These developments underscore the fact that technical innovation generally outpaces regulation and accordingly, the Commission should refrain from draconian regulation, such as the in-region restriction, except when such harsh measures are absolutely necessary.

[13] *See* Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for May 10, 2000, Public Notice DA 00-43, released January 10, 2000.

[14] *In the Matter of* Allocation and Designation for Fixed Satellite Services; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations, IB Docket No. 97-95, *Report and Order*, 13 FCC Rcd. 24649 (1998).

[15] *In the Matter of* Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement, *rel.* November 22, 1999.

and Administrative actions, the market is awash in spectrum capable of delivering both basic and broadband services. Even assuming, for the sake of argument, that a rural telephone company wanted to behave "anti-competitively,"[16] it would have no incentive to acquire an LMDS license to "forestall" competition. As Commissioner Furchtgott-Roth eloquently stated:

> The availability of these [competitive wireless] market alternatives further undermines the notion that ILECs and cable companies would have a rational incentive to purchase all the relevant spectrum in each of the fixed wireless bands in order "to protect their market power and preserve a stream of future profits." The market has simply created too many alternatives for there to be any economically rational "warehousing" of spectrum. This is especially true at a time when incumbent cable and wireline telephony providers are defending their turf from competitors of all shapes and sizes.

NPRM, Dissenting Statement of Commissioner Harold Furchtgott-Roth, p. 2 (footnote omitted).

Even if a rural telephone company wanted to purchase all of the available relevant spectrum, it would be impossible to do so.[17] Roughly speaking, a rural telephone company would have to acquire approximately 3,700 megahertz of spectrum in the various fixed and mobile services discussed above.[18] In addition, in most instances, a rural telephone company would have to acquire a license for an immense geographic area, such as a Regional Economic Area Grouping ("REAG"), an Economic Area ("EA") or a Major Trading Area ("MTA") in order to "forestall" competition in its small wireline service

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[16] As discussed in Section II. B below, however, rural telephone companies do not behave in this manner.

[17] For example, the Commercial Mobile Radio Services ("CMRS") spectrum cap limits the amount of spectrum that a single entity may own in any geographic service area. *See* 47 C.F.R § 20.6.

[18] This estimate includes 50 megahertz cellular spectrum, 120 megahertz PCS, 36 megahertz UHF, 400 megahertz 24 GHz, 1300 megahertz LMDS, 1400 megahertz 39 GHz, 186 megahertz MMDS and 202 megahertz proposed in the Commission's Spectrum Policy Statement. In addition, a rural telephone company would also have to acquire spectrum allocated to various satellite services such as Hughes DirecPC, in order to forestall all wireless competition.

area.[19] Not only would such behavior be irrational, as RTG and other rural representatives have repeatedly informed the Commission, rural telephone companies simply lack the resources to acquire licenses for such large geographic areas. The "strategy" of buying *ALL* available spectrum and then warehousing it merely to avoid competition from wireless providers, is a "strategy" that only a regulator could embrace. There is simply no economic rationale for this type of behavior. Because a rural telephone company would not and could not forestall competition in either basic or broadband services by acquiring an LMDS license, there is no justification for the extension of the restriction and it should be allowed to sunset as anticipated.

B. The In-region Restriction As Applied to Rural Telephone Companies Has Hindered Rather Than Promoted the Deployment of Broadband Services to Rural Areas

While affording little if any benefit to members of the public residing in rural areas, the application of the in-region restriction to rural telephone companies has imposed significant economic and social costs. Most notably, the in-region restriction has hindered the deployment of broadband services to rural areas by precluding participation by the very providers who are most likely to deploy such service to rural areas, namely rural telephone companies.

As RTG has previously advised the Commission, rural areas, with their vast spaces, low population densities, difficult terrain (*e.g.*, mountain ranges and deserts), and harsh weather, remain expensive and challenging locations to serve.[20] The differing demographics and physical characteristics

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[19] For example, in order to forestall competition from a 39 GHz licensee, a rural telephone company would have to be the high bidder on fourteen EA licenses and then still might face competition from a 39 GHz incumbent such as WinStar.

[20] *See, e.g.*, Comments of RTG in WT Docket No. 99-327, filed January 19, 2000.

of rural and urban areas lead to differing service offerings and economic models. These differences attract different types of investors and providers with different telecommunications expertise, financial expectations and business plans, but the limited financial gain and long return horizon make providing service to rural areas unattractive to most large providers. As past experience has shown, licensees who acquired their spectrum at auction tend to deploy service to dense urban areas rather than the sparsely populated rural areas. Large carriers lack the incentive, expertise or inclination to deploy service to rural areas.

In contrast, rural telephone companies are experts in providing telecommunication services to difficult-to-serve rural areas. They can build off existing infrastructure. They are poised to take advantage of new technologies to introduce competition to larger ILECs and to provide new and advanced services to their existing subscribers. Most importantly, rural telephone companies are committed to the rural communities they serve. Their owners, board members, and managers participate in the life and health of these rural communities. Many rural telephone companies interested in LMDS are cooperatives owned by the very customers they seek to serve. The subscriber-owners of these cooperatives are willing to accept a lower rate of return than large commercial wireless companies in order to ensure that they, their families and neighbors are able to receive the type and quality of services demanded by the community. Accordingly, rural telephone companies see opportunity and long-term benefits, where others see only a low rate of return on a high-risk undertaking.

Sections 254 and 309(j) of the Act, and Section 706 of the 1996 Act, require the Commission to encourage and ensure the deployment of advanced telecommunications capabilities and services to

all Americans, including those in rural areas. Both the Commission and Congress are concerned about a possible "digital divide" between the information haves and have-nots, and Chairman Kennard has stressed the importance of "promot[ing] the deployment of broadband services to all Americans, *including rural consumers, who might otherwise be left behind their urban counterparts in the receipt of such services....*"[21]

LMDS is nothing if not bandwidth and rural telephone companies could use it to deploy such advanced services as telemedicine, video conferencing and high speed Internet access to rural communities and campus settings in rural areas. These are precisely the kinds of advanced services contemplated by Section 706 of the 1996 Act and by Section and 309(j) of the Act. These services are the bridge for crossing the digital divide to ensure that rural consumers are not left behind on information back roads.

RTG notes that but for the in-region restriction, LMDS might have constituted a unique opportunity for rural telephone companies to deploy broadband services to rural areas. While LMDS is not unique in its ability to support competition, LMDS is unique in that the Commission licensed LMDS in BTAs rather than larger geographic areas such as EAs adopted for the 39 GHz auction and proposed for the 24 GHz auction. As RTG has repeatedly advised the Commission, rural telephone companies lack the ability to acquire such huge license areas and the high bidders for such areas are unwilling to partition their licenses. LMDS was also unique because small businesses could compete against large companies because of the significant bidding credits afforded at auction. But for the

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[21] Statement of Chairman William E. Kennard Re Section 706 of the Telecommunications Act of 1996 and Bandwidth, Released April 22, 1998 (emphasis added).

impediment of the in-region restriction, LMDS could have been a rare opportunity for rural telephone companies to deploy broadband wireless services. Instead, the opportunity was wasted and rural areas have, not surprisingly, been overlooked.

Accordingly, by severely limiting rural telephone companies' ability to use LMDS, the Commission also severely hindered the deployment of service to rural areas. If the Commission truly intends that advanced technology is timely deployed to all Americans,[22] it must allow the in-region restriction to sunset.

C. The Commission Should Modify the Applicable Standard For Reviewing the Sunset of the In-region Restriction

In addition to seeking broad comment on whether to allow the restriction to sunset, the Commission also seeks comment on what standard it should apply when making its decision.[23] In the *NPRM*, the Commission notes that pursuant to Rule Section 101.1003(a)(1), the in-region restriction will terminate unless the Commission "extend[s] its applicability based on a determination that incumbent LECs or incumbent cable companies continue to have substantial market power in the provision of local telephony or cable television services."[24] The Commission further notes that consistent with its findings in the *NPRM*[25] this standard would suggest that the Commission extend the

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[22] 47 U.S.C. § 706(a).

[23] *See NPRM* ¶ 42.

[24] *See id.* ¶ 40.

[25] In Section III. A. of the *NPRM* the Commission determined that incumbent LECs continue to hold dominant positions in the local exchange and local exchange access markets. *See NPRM* ¶¶ 13, 24.

applicability of the eligibility restriction.[26] The Commission, however, has "significant questions" about whether the current standard is the appropriate one for evaluating whether to extend the restriction.[27]

The Commission's doubts regarding the current standard are well founded, and RTG strongly supports the modification of the standard for evaluating whether or not to sunset the in-region restriction. The current Rule Section 101.1003(a)(1) standard is overly simplistic and biased toward regulation rather than innovation and market-based solutions. It is inconsistent with the Commission's general policy of favoring market solutions rather than regulation. The current standard also fails to consider numerous important factors which the Commission should consider in making its decision. For example, the current standard fails to consider the true costs of maintaining the restriction.

Eligibility restrictions are among the most severe forms of regulation. They impose significant social and economic costs, many of which -- such as the true impact on financial markets -- cannot be fully known or measured. The Commission should modify its standard for evaluating the sunset of the restriction to favor market forces rather than regulation and to account for the substantial costs (both known and unknown) which the in-region restriction imposes.

In evaluating whether to allow the in-region restriction to sunset, the Commission should apply a standard similar to that which it applied in rejecting the imposition of an eligibility restriction in the 39 GHz service.[28] Specifically, the Commission should allow the in-region eligibility restriction to sunset

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[26] *See id.* ¶ 40.

[27] *See id.*

[28] *See, Amendment of The Commission's Rules Regarding The 37.0-38.6 GHz And 38.6-40.0 GHz Bands*, ET Docket No. 95-183, RM-8553, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, PP Docket No.

unless the Commission determines that open eligibility would result in a "significant likelihood of substantial competitive harm in specific markets"[29] and there is no other less burdensome or disruptive means of redressing the substantial competitive harm. The Commission should require that the feared competitive harm be "substantial" because the in-region restriction is a draconian regulatory measure with significant costs (such as hindering the deployment of service to rural areas) and these costs can only be offset by "substantial" competitive harm. The Commission should require that there be a "significant likelihood" of the substantial harm occurring rather than a mere risk of its occurrence because it is extremely difficult to predict the use and development of technology in today's highly innovative telecommunications markets. As discussed above, many of the Commission's LMDS-predictions have not been accurate. The marketplace is better suited than heavy handed regulation to create competition, and the more attenuated the possibility of the occurrence of harm, the more likely that the regulation will distort rather than facilitate the operation of the marketplace.

As RTG has demonstrated above, the elimination of the in-region restriction will not result in a significant likelihood of a substantial competitive harm. Even assuming for the sake of argument that a rural telephone company were to acquire and warehouse an LMDS license for "anti-competitive" purposes, there would be no substantial competitive harm because it would be impossible to eliminate or forestall competition by acquiring such an LMDS license. Moreover, such behavior is extremely unlikely to occur because rural telephone companies lack the ability or economic incentive to acquire

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93-253, (1997) *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600 (*39 GHz R&O*).

[29] *Id.* ¶ 32.

and "warehouse" LMDS spectrum in order to "forestall competition." There is simply too much spectrum available in comparable wireless services and too many alternative technologies, both wired and wireless, for a rural telephone company to attempt to or to be able to forestall competition by acquiring an LMDS license. Accordingly, the Commission should modify the applicable standard of review and allow the in-region restriction to sunset.

III. Conclusion

LMDS is one telecommunications tool among many for providing basic and broadband services. As a result of industry, Congressional, and Commission action, the market place is full of comparable spectrum and alternative competitive technologies. There is too much spectrum available in comparable wireless services and too many alternative technologies, both wired and wireless, for a rural telephone company to attempt to forestall competition in either basic exchange service or broadband service by acquiring and warehousing LMDS spectrum. Accordingly, rural telephone companies have no incentive or ability to acquire and warehouse LMDS spectrum for anti-competitive purposes.

Because there are many avenues for competition to develop, and rural telephone companies have no incentive to waste precious resources "warehousing" spectrum in an attempt to "forestall" the development of one of them, *i.e.* LMDS, there is very little risk that allowing the in-region restriction to sunset would result in substantial competitive harm. While there is little risk of harm from allowing the restriction to sunset, extending the restriction will continue to impose additional economic and social costs, such as further delaying the deployment of service to rural areas. Because there is little risk of competitive harm from the elimination of the restriction and significant cost for its extension, the

Commission should take whatever action is necessary to allow the in-region restriction to sunset.

For the reasons discussed above, RTG respectfully requests that the Commission allow the LMDS in-region eligibility restriction to sunset on June 30, 2000.

Respectfully submitted,

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